Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of The United States

October Term, 1993

CHING LUEN ENTERPRISES CO.,

Petitioner,

vs.

PETER H. MASON, ET AL.,

Respondents,

Petition for Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Law Office of James L. Andion
301 N. Lake Ave.,Suite 720A
Pasadena, California 91101
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Attorney for Petitioner

90 pp

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner's fundamental right to counsel, right of access to the courts, right to equal protection and due process of law are violated when the trial court and the 9th Circuit refused to allow Petitioner to bring this action for legal malpractice, and inter alia, for refund of clients' trust funds when Petitioner discharged its former attorneys but the former attorney failed to transfer promptly all materials belonging to Petitioner to the new lawyer in accordance with Petitioners' written instruction.

2. Whether the district court violated the due process right of Petitioner, a Republic of China entity,

6,000 miles away from the forum, by forcing it to produce evidence in five working days, in opposition to the summary judgment motion.

3. Whether (1) Petitioner has the absolute right, as the client, to obtain its client files from its former attorneys in connection with several pending litigation cases when it discharges its former attorneys, (2) the former attorneys have the absolute duty to promptly return the client trust funds and client files to Petitioner or the new lawyer retained by Petitioner under the existing professional standards and federal laws.

4. Whether the trial court legally and reasonably treated Respondent Peter H. Mason's Motion To Dismiss as one for

summary judgment, when the facts in the complaint were taken as true and when both parties have material disputes on each and every material fact in the complaint.

ALL PARTIES TO THE PROCEEDING

PETITIONER:

CHING LUEN ENTERPRISES CO., LTD., A TAIWAN, REPUBLIC OF CHINA, CORPORATION.

RESPONDENTS:

PETER H. MASON, ET. AL., PARTNERS IN FULBRIGHT & JAWORSKI, A PROFESSIONAL CORPORATION.

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I. OPINIONS BELOW

A. OPINIONS OF THE COURT OF APPEALS FOR THE 9TH CIRCUIT

1. In the decision of the Court of Appeals, dated September 13, 1993 which is not for publication and is entitled "Memorandum", attached hereto as Appendix A, the 9th Circuit affirmed the district court's summary judgment in favor of Respondents.

2. In the decision of the 9th Circuit, the petition for rehearing was denied and the suggestion for rehearing en banc was rejected on December 29, 1993. The decision is not for

publication and is attached hereto as Appendix B.

B. OPINIONS OF THE TRIAL COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

1. THE ORDER DATED DECEMBER 18, 1991

In said order, the trial court decided to treat Respondents' Motion to Dismiss as one for summary judgment and allowed Petitioner to present evidence and material in opposition, but Petitioner had to do so no later than five (5) court days from the date of the order. The trial court also admonished Respondents to refrain from writing letters to the court or otherwise communicating with the court unless opposing counsel is present. The order is attached hereto as Appendix C.

2. JUDGMENT ON DECISION BY THE COURT DATED JANUARY 31, 1992

In the judgment, the trial court decided that the action be dismissed on the merits. The judgment is attached hereto as Appendix D.

3. FINDINGS OF FACT AND CONCLUSIONS OF LAW ON MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS FULBRIGHT & JAWORSKI, ET AL. MADE BY THE TRIAL COURT ON JANUARY 31, 1992

The trial court granted Respondents' Motion For Summary Judgment and determined the findings of fact and conclusions of law:

(1) Findings of Facts that, Respondents returned all the client files to Shieh.

(2) Conclusions of Law

The case was dismissed in its entirety and judgment entered on the merits in favor of all defendants. The decision is attached hereto as Appendix E.

II. JURISDICTION

The decision ("Memorandum") of the Court of Appeals for the 9th Circuit was entered on September 13, 1993, which affirmed the trial court's decisions for Respondents. The judgment of the Court of Appeals for the 9th Circuit was entered on December 29, 1993, which denied Petitioner's petition for

rehearing and rejected the suggestion for rehearing en banc.

Constitutional issues are involved in the within action, e.g., whether Petitioner was deprived of its right to counsel and right of due process of law. Decisions made by the 9th Circuit appear to be in conflict with those of other Circuits.

Under 28 U.S.C. §1651 (a) and Supreme Court Rule 10.1 (a), this Court will review a decision, rendered by a United States court of appeals, if it is in conflict with the decision of another United States Court of Appeals on the same matter, or a federal question is decided by a United States Court of Appeals in a manner in conflict with a state court of last resort, or has so far departed from the accepted and usual course

of judicial proceedings, or sanctioned such a departure by a lower court, so as to call for an exercise of this Court's power of supervision.

III. CONSTITUTION AND FEDERAL LAWS INVOLVED

A. The United States Constitution.

B. The Fourteenth Amendment to the United States Constitution.

C. The accepted and usual course of judicial proceedings, courtesies generally afforded to counsel in the content of

representation of a foreign corporation and the established laws.

IV. STATEMENT OF CASE

Petitioner is a Chinese corporation that has been represented by Liang-Houh Shieh, a leading Chinese and American attorney with a substantial clientele consisting of many large Chinese corporations like Petitioner. Mr. Shieh was a partner at Lewis, D'Amato, Brisbois & Bisgaard in 1990, but was invited to join the Firm of FULBRIGHT & JAWORSKI, Respondents here in the within action, as a partner at the beginning of 1991. Mr. Shieh brought Petitioner to Fulbright as a client of that firm upon his departure from Lewis, D'Amato.

However, Fulbright took action to terminate Mr. Shieh as a partner less than three months after Mr. Shieh started working there. In connection with the separation of those two parties, Petitioner's files were retained by Fulbright, contrary to Petitioner's wishes, for a period of time which Petitioner alleges was very substantial in light of the extent and immediacy of the various litigation matters in Fulbright's possession.

Petitioner was frustrated and outraged over the retention of its files by Fulbright and the resulting damages incurred through the delays associated with Fulbright's wrongful retention of the files. Consequently, Petitioner brought an action in the district court for the central district

of California on a wide variety of claims for relief. Quinn, Kully & Morrow, a professional corporation and Respondents' attorney, was included in the action on information and belief that they had contributed to the delay in such a way as to render them liable along with Respondents, and was the actual retainer of the files in certain cases.

In reply to Petitioner's complaint, Respondents Fulbright filed a Rule 12 (b) motion to dismiss and Quinn, Kully and Morow ("QK&M") brought a Rule 56 motion for summary judgment. The hearing was held on these motions on December 15, 1991. The district court converted the 12 (b)(6) motion to one under Rule 56 and granted it along with QK&M's motion for summary judgment. In the order dated December 18, 1991, the district court gave Petitioner a mere five (5) court

days in which to present evidence and material in opposition.

The district court did not address the change in the moving party's burden necessitated by the conversion of its 12 (b) (6) motion to one under rule 56, the right of Petitioner to be appraised of Respondents' contentions as to uncontroverted material facts before being required to present evidence and material in opposition, or Petitioner's need to complete discovery in an action involving numerous complex claims for relief.

It was virtually impossible for Petitioner to comply with the requirements imposed by the district court, because Petitioner is a foreign entity, 6,000 miles away from the forum. A mere five court days

are not sufficient to obtain and present evidence and material in opposition. The district court, however, granted the converted rule 12 (b) (6) motion and granted judgment in favor of Respondents and all related defendants by citing that Petitioner failed to present evidence and material.

V. ARGUMENTS

A. THE DISTRICT COURT VIOLATED PETITIONER'S DUE PROCESS RIGHT BY IMPOSING THE HIGHLY IMPRACTICAL REQUIREMENTS IN THE CASE OF ASKING PETITIONER TO PRESENT EVIDENCE AND MATERIAL IN OPPOSITION IN FIVE (5) COURT DAYS

1. The district court decision to give Petitioner five (5) court days to present evidence and material was a highly impractical, if not impossible requirement with which to comply. [1]

Petitioner is a Chinese corporation, organized and existing under the laws of Taiwan, Republic of China. Republic of China is a country more than 6,000 miles away from the forum in California. It could take about four or five (5) days for an express mail to be delivered to ROC, and at least another five days for a responsive mail to come back to the United States, providing that there is no delay on the way, that Petitioner is available any time and responds immediately.

[1] If there is no delay in handling, it takes about two days for mail to move, from the location of the district court in Downtown LA to the location of Petitioner's attorney in Pasadena. The distance between the two locations is only 10 miles.

Obviously, the five day requirement cannot possibly be met.

Even the 9th Circuit admitted, in its Memorandum, that "five days is not an abundance of time", and concluded that Petitioner had its chance. When Petitioner failed to meet the impossible requirement of five court days to present evidence, it blamed Petitioner because "it never asked for more time".

The decision of the 9th Circuit is in conflict with those of the 1st Circuit. In Condon v. Local 2944, United Steelworkers, 683 F.2d 590,593 (1st Cir. 1982), the 1st Circuit held that three weeks before ruling on a motion was sufficient time.

Furthermore, the 9th Circuit even created conflicts between the decision in the within action and those in its precedence. In Townsend v. Columbia Operations, 667 F.2d 844 (1982), the 9th Circuit ruled that three weeks was sufficient time, even when the party never asked for more time. The Townsend Court also stated that "If a motion addressed to the sufficiency of the pleading on its face is to be treated as motion for summary judgment and matters outside the pleading considered, plaintiffs should be given a reasonable opportunity to submit opposing material."

However, a "reasonable opportunity" for Petitioner "to submit opposing material" was denied or deprived in this case.

In Portland Retail Druggists Ass'n v. Kaiser Foundation Health Plan, 662 F.2d 641 (9th Cir. 1981), the Court stated that "Before summary judgment may be entered against a party, that party must be afforded both notice that a motion is pending, and adequate opportunity to respond; implicit in the opportunity to respond is the requirement that sufficient time be afforded for discovery necessary to develop facts essential to justify a party's opposition to the Motion."

In light of the fact that Petitioner is a foreign entity and located in a distant country, the five court days cannot be remotely considered as "sufficient time" for discovery necessary to develop facts essential to justify a party's opposition.

There is a long line of cases establishing the principle of sufficient time.

In Lucas et al. v. Corporation et al., 633 F.2d 757 (1980), the 9th Circuit considered "this contention possesses merit because the district court summarily dismissed the labor claims out of consideration which went beyond the face of the complaint without however allowing sufficient fact gathering as provided in the rules". In Portland, supra, the Court ruled "That a three month period was also sufficient to generate or devolop facts relevant to the McCarran-Ferguson issue." And in British Airways Board v. The Boeing Company, 585 F.2d 946 (1978), the Court agreed that "it is generally true that what

amounts to summary judgment should not be granted until the opposing party has been afforded discovery".

All of the holdings above-cited were ignored.

2. The language factor and the difference in legal systems between ROC and the United States were ignored by the district court

It should have been within the common knowledge of the district court that the Chinese speak different languages than English. To communicate with Petitioner in Taiwan, all of whose officers are Chinese, the counsel has to translate all important legal documents, written in English, into Chinese, and send translations along with the originals to the Republic of China.

Furthermore, the fact that the civil justice system in the Republic of China is based on the Japanese model, jurisprudentially belonging to another major law family in the world, makes the translating work much more difficult.

B. PETITIONER'S ABSOLUTE RIGHT TO OBTAIN ITS FILES FROM ITS FORMER ATTORNEYS WAS VIOLATED AND RESPONDENTS' ABSOLUTE DUTY TO TURN OVER THE CLIENT TRUST AND FILES WAS NOT SATISFIED

1. Petitioner's absolute right

It has long been recognized in this state that the client's power to discharge an attorney, with or without cause, is absolute. Code Civ. Proc. §284.

In Fracasse v. Brent 6 Cal. 3d 784, 790; 100 Cal. Rptr. 385 (1972), the Supreme Court of California held that a client should have both the absolute power and right at anytime to discharge his or her attorney with or without cause. It is immaterial that such a substitution will work to the purported detriment of the original attorney.

In Kallen v. Delug 157 Cal. App. 3d 940,950; 203 Cal. Rptr. 879 (1984), the court held that "a client's power to substitute one attorney for another has little meaning unless its exercise is accompanied by the original attorney's prompt execution of a substitution of attorney. The original attorney's refusal to comply works a serious hardship on the client and puts the client's interest at risk."

The term "absolute" means unconditional. The imposition of a confirmation directly from the clients is clearly contrary to the public policy of this state to condone a violation of the ethical duties which an attorney owes to his client. Academy of California Optometrists, Inc. v. Superior Court 51 Cal. App. 3d 999; 124 Cal. Rptr. 668.

2. Respondents' absolute duty

Rule 3-700(D) of the California Rules of Professional Conduct provides:

"A member whose employment has terminated shall:

(1) subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. Client papers and property include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's report, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; . . ."

It is the holding of Baker v. Humphrey 101 U.S. 494; 25 L.Ed. 1065 that as logically related with a client's right to substitution of mew attorneys, a client has both the absolute power and right to discharge his or her attorney, with or without cause, at anytime.

Both American Bar Association Model Code of Professional Responsibility and California Rules of Professional conduct require a lawyer to keep a client informed about the status of a matter and promptly comply with reasonable requests for information.

However, the above mentioned rules were overlooked by both the trial court and the 9th Circuit.

C. PETITIONER'S RIGHT TO COUNSEL WAS VIOLATED

Petitioner has its fundamental right, and right to counsel, and Petitioner's substitution of a new attorney is part of such right.

In Texas Catastrophe Property Ins. Ass'n v. Morales C.A.5, 975 F.2d 1178 (1992), it was declared that a "right to counsel in a civil matter is one of constitutional dimension and should be freely exercised without impingement." The right to counsel has been considered even more fundamental than the other right guaranteed by the Bill of Rights regarding the function of justice. Steadman v. Duff D.C. Fla., 302 F.Supp. 313 (1969).

In Elie v. Henderson D.C.La., 340 F.Supp. 958 (1972), the Court stated: "The constitutional right to counsel is the right of the client to have legal counsel if he wishes, and not the right of the attorney to counsel who does not seek his advice." Thus, a client has an absolute right to substitute

new counsel and such substitution should be effective immediately upon notice by new counsel.

D. THERE ARE MANY GENUINE ISSUES OF MATERIAL FACT ON WHICH PETITIONER IS ENTITLED TO RELIEF

Respondents have attempted in both the trial court and the 9th Circuit to make its failure to turn over Petitioner's files look reasonable. However, Petitioner contends the record, demonstrates that Respondents' actions were manifestly unreasonable.

In the trial court, Respondents claimed that "there is only one issue in this case, and that is whether Fulbright's retention of Client's files while it attempted to confirm the client's wishes respecting their transfer

was appropriate." If this is the only issue, it certainly cannot be resolved on the record before the district court, and the order granting Respondents' motion for summary judgment must be reversed.

In fact, the record below raises genuine issues of material fact, and Respondents's arguments regarding the reasonableness of Respondents' retention of the files make that abundantly clear.

From Petitioner's perspective, some very important triable facts remain to be determined. Among those are the following:

(1) Was Respondents' retention of Petitioner's files part of an effort to get Petitioner to remain a client of Respondents

rather than following Shieh after he was allegedly terminated?

(2) Did Respondents retain Petitioner's files to coerce payment of a contested billing?

(3) Did Respondents retain Petitioner's files out of a spiteful desire to harm Shieh's practice after Shieh had sued Respondents for wrongful termination?

(4) What other efforts did Petitioner or its attorneys make to get Respondents to turn over the files, and would such efforts reflect upon the reasonableness of Respondents' retention of Petitioner's files?

(5) Why didn't Respondents turn the files over to the authorized agent, after the alleged problems with Attorney Araiza?

The record below is clearly inadequate for the granting of a motion for summary judgment, and the order of the district court should, accordingly, be reversed.

VI. CONCLUSION

In light of the foregoing, this Petition for a writ of certiorari should be granted.

Dated: January 12, 1994

Respectfully Submitted,

James L. Andion
Attorney for Petitioner
Ching Luen Enterprises

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SEP. 13, 1993

CHING LUEN ENTERPRISES CO., LTD.,

PLAINTIFF-APPELLANT,

V.

PETER H. MASON,ET AL.,

DEFENDANTS-APPELLEES.

CASE NO. 92-55138

D.C.NO. CV-91-5962-RG

MEMORANDUM*

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th cir. R. 36-3.

BEST A

Appeal from the United States District court
for the Central District of California
Richard A. Gadbois, Jr.,
District Judge, Presiding
Submitted July 15, 1993**
Pasadena, California

Before: Wood, Jr.,*** REINHARDT AND RYMER, CIRCUIT JUDGES.

I. BACKGROUND

Plaintiff Ching Luen Enterprises Co., Ltd. ("CLE") sued partners of Fulbright & Jaworski ("Fulbright") for allegedly wrongfully retaining CLE client files. CLE

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34 (a) and Ninth Circuit Rule 34-4.

*** The Honorable Harlington Wood, Jr., United States Senior Circuit Judge for the Seventh Circuit, sitting by designation.

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also sued Fulbright's attorneys, partners of Quinn, Kully & Morrow ("QK&M"), alleging the CLE files were wrongfully held by them.

CLE, a Chinese corporation, was a client of Liang-Houh Shieh who joined Fulbright as a partner. When Fulbright began action to terminate Shieh as a partner, CLE sought to recover its files at Fulbright. The files were turned over within approximately three and a half months of the initial request. Fulbright claims it was attempting to determine from CLE where it wanted the files to be sent in those three months. CLE claims in its lawsuit that the delay was a breach of contract, a breach of covenant of good faith and fair dealings. a breach of fiduciary duty, legal malpractice, trespass, conversion, negligent interference with prospective economic advantage, an invasion

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of privacy, a violation of the Equal Credit Opportunity Act, and a violation of the Unruh Civil Rights Act.

CLE first sought to recover the files in May 1991. Fulbright received a copy of a form file transfer letter in May from an officer of CLE addressed to three people. This letter purported to authorize the three to take CLE files and money from CLE's trust account. Fulbright refused to turn over the files on the basis of the letter without prior confirmation from CLE directly. After receiving no response from CLE, Fubright attempted to deliver the files to one of the three persona who in turn refused to accept them because she was no longer Shieh's lawyer. Fulbright gave the files to Shieh in August when it still had not heard directly from CLE about the disposition of the files.

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CLE filed its complaint in October 1991 with ten different claims for relief. Four letters were attached to the twenty-seven page complaint, including the form file transfer letter and several letters from Fulbright to CLE.

In November 1991, Fulbright filed a motion to dismiss, and QK&M filed one for summary judgment. The district court heard the motions at a hearing on December 16, 1991. The court converted Fulbright's motion to dismiss into a summary judgment motion and then granted both motions. On December 18, the court suspended its December 16 ruling, ordered the motion to dismiss to be treated as one for summary judgment, and directed plaintiff to "present evidence and material in opposition" within five court days. The

December 16 order was suspended for consideration of the additional evidence and material to be submitted. Plaintiff submitted a memorandum in opposition to the motion to dismiss but did not summit any additional factual evidence. On January 31, 1992, the court granted both summary judgment motions.

II. ANALYSIS

A. Conversion into Summary Judgment

CLE objects to the conversion of the motion to dismiss into a summary judgment motion. CLE argues that matters outside the pleadings were not involved, and that it did not receive adequate notice and opportunity to present material for a summary judgment decision. Additionally, CLE argues that the district court impermissibly made factual

findings in contravention of the proper standard for deciding summary judgment motions.

A motion under Rule 12 (b) (6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted is converted into one for summary judgment under Rule 56 when "matters outside the pleadings are presented to and not excluded by the court" Fed. R. Civ. P. 12(b). These "matters" can be depositions, answers to interrogatories, affidavits, or any other written or oral evidence in support or in opposition to the pleading. %A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1366 (1990). Either the pleader or moving party can trigger the conversion. Id.

The district court converted Fulbright's motion because CLE presented matters outside the pleadings by attaching several exhibits to its complaint. CLE argued in district court that the Fulbright letters contained self-serving hearsay which CLE did not want to be bound to just because it attached the letters to the complaint. The district court, however, relied upon the letters in its decision and at the hearing stated: "All of this quibbling about whether these exhibits have to be excised from the allegations of the complaint. I'm not going to get involved in it, I'm going to convert it to a Rule 56 determination." (Hr'g on Dec. 16, 1991 at 9.) We believe the court properly converted the motion to dismiss into one for summary judgment since "matters outside the pleadings" were relied upon by the court. See Grove v. Mead Sch. Dist., 753 F.2d 1528, 1533

(9th Cir.), cert. denied, 474 U.S. 826 (1985); Townsend v. Columbia Operations, 667 F.2d 844,849 (9th Cir. 1982).

A 12 (b) (6) conversion must also give the non-moving party adequate notice and opportunity to "present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b); Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan, 662 F.2d 641, 645 (9th Cir. 1981). Contrary to CLE's argument, it did have adequate notice that the motion was pending and a reasonable opportunity to respond. "[N]otice is adequate if the party against whom judgment is entered is 'fairly apprised' that the court will look beyond the pleadings." Grove, 753 F.2d at 1532. At the hearing on December 16, 1991, CLE had notice when the judge stated the motion would be converted. Then two days

later, CLE again had notice when the court issued the order converting the motion to dismiss into one for summary judgment.

We further reject CLE's claim that it did not have an adequate opportunity to present additional factual evidence. The court gave it such an opportunity in its December 18 order when it gave CLE five days to present evidence in opposition to the summary judgment motion. CLE's counsel indicated that if he had known the motion would be treated as one for summary judgment, he would have submitted additional evidence. Nevertheless, when given the opportunity by the court, CLE submitted a legal memorandum and refused to submit anything else in opposition to the summary judgment motion. While five days is not an abundance of time, CLE had its chance, and it never asked for more time. See Fed. R.

Civ. P. 56 (f). See also Condon v. Local 2944, United Steelworkers, 683 F.2d 590, 593 (1st Cir. 1982) (three weeks before ruling on motion sufficient time); Townsend, 667 F.2d at 850 (three weeks sufficient when party never asked for more). The purpose of the requirement that a party have an opportunity to respond is to allow time for the development of factual matters relevant to a summary judgment resolution. See Portland Retail, 662 F.2d at 645. But full discovery is not required and may not be necessary in order to resolve a summary judgment motion. Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 602 (9th Cir. 1976). This case is not complex, and based upon the pleadings and attached letters, additional discovery would have been fruitless. See Admiralty Fund v. City Nat'l Bank, 677 F.2d 1315,1317 (9th Cir. 1982).

B. Summary Judgment

On summary judgment, which we review de novo, Tzung v. State Farm & Fire Casualty Co., 873 F.2d 1338, 1339 (9th Cir. 1989), the court found there were no material issues of fact in dispute. CLE claims, however, there were numerous facts in dispute which the court improperly resolved, including whether a file transfer letter was addressed to Fulbright or instructed Fulbright to do anything. CLE also claims it is disputed whether Fulbright acted reasonably in turning over CLE's files, and whether QK&M ever had possession of the files.

The exhibits attached to the complaint conclusively show that these facts are not genuinely in dispute. The district court did

not resole any factual issues in contravention of summary judgment analysis. The file transfer letter is not addressed to Fulbright, and it does not instruct Fulbright to do anything. The letters written by Fulbright establish that Fulbright attempted to return the files after CLE failed to respond to its direct inquiries. Fulbright did then deliver the files -- within three and a half months of the first request for the files. Fulbright fulfilled its burden under Rule 56 (c). CLE has failed to do more than "rest upon the mere allegations or denials of [its] ... pleading." Fed. R. Civ. P. 56(e); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

Fulbright was entitled to judgment as matter of law because CLE's legal arguments are without merit as the district court correctly found. CLE, furthermore, cannot

argue the merits of its appeal "on the bases stated in [its] . . . original *Memorandum of* Points and Authorities filed in opposition to the Fulbright motion" in district court. (Appellant's Opening Brief at 24.) This is in violation of the Ninth Circuit Rule 28-3.2: "Parties must not append or incorporate by reference briefs submitted to the district court . . . or refer this Court to such briefs for their arguments on the merits of the appeal." See also United States v. Marchini, 797 F.2d 759, 767 (9th Cir. 1986), cert. denied, 479 U.S. 1085 (1987).

Summary Judgment for QK&M was granted because the court found the facts did not show the firm ever had possession of any CLE files. CLE has only speculative inferences and allegations in support of its claims against QK&M and failed to offer any specific proof that QK&M did possess the files. The

court did not resolve any factual dispute in order to decide the motion, and the court is entitled to disregard the non-moving party's implausible claims. See Jackson v. Bank of Hawaii, 902 F.2d 1385, 1389 (9th Cir. 1990). The court correctly found that QK&M was entitled to judgment as a matter of law.

C. Amendment of the Complaint

In a final effort to save its case, CLE claims it should have been allowed to amend the complaint before it was dismissed. In this circuit, it is immaterial that CLE did not ask to amend its complaint in response to the motion to dismiss; if an amendment could have saved the complaint, the district court should have given CLE leave to amend. Cook, Perkiss & Liehe, Inc. v. Northern Ca. Collection Serv. Inc., 911 F.2d 242, 247 (9th Cir. 1990). Any amendment, however, would have been futile because the acts complained

of would not support any claim for relief. See Roth v. Garcia Marquez, 942 F.2d 617 (9th Cir. 1991).

III. CONCLUSION

The district court's grant of summary judgment in favor of defendants is AFFIRMED.[2]

* * * * *

Richard R. Hopkins, Pasadena, California, for plaintiff-appellant.

Margaret M. Morrow, Quinn, Kully & Morrow, Los Angeles, California, for defendants-appellees.

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[2] The parties' respective requests for judicial notice are denied. Defendants' request for sanction under Rule 38 of the Federal Rule of Appellate Procedure is also denied.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DECEMBER 29, 1993

CHING LUEN ENTERPRISES CO., LTD., A TAIWAN, REPUBLIC OF CHINA, CORPORATION,

PLAINTIFF-APPELLANT,

V.

PETER H. MASON, ET AL.,

DEFENDANT-APPELLEES.

NO. 92-55138

D. C. NO. 91-5962-RG

ORDER

Before: WOOD, JR.*, REINHARDT, and RYMER, Circuit Judges:

The panel has voted to deny appellant's petition for rehearing. Judges Reinhardt and Rymer have voted to reject the suggestion for rehearing en banc and Judge Wood has so recommended.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Harlington Wood, Jr., United States Senior Circuit Judge for the Seventh Circuit, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DECEMBER 18, 1991

CHING LUEN ENTERPRISES CO., ET AL.,

PLAINTIFFS,

VS.

PETER H. MASON, ET AL.,

DEFENDANTS.

CASE NO. CV 91-5962 RG (Ex)

order

Having considered the papers and pleadings in connection with Defendants' Fulbright & Jaworski, et al. Motion to Dismiss, and having determined that this matter is best resolved in the form of a Motion for Summary Judgment,

IT IS HEREBY ORDERED THAT:

1. Pursuant to Fed. R. Civ. Proc. 12 (b), Defendants' Motion to Dismiss shall hereby be treated as one for summary judgment.

2. In accordance with this order Plaintiffs may present evidence and material in opposition. Such evidence and material shall be presented not later than five (5) court days from the date of this order.

3. Defendants may file evidence in response to Plaintiffs' evidence no later than ten (10) court days from the date of this order.

4. Pending consideration of the additional evidence and material, this court's ruling of December 16, 1991 is hereby suspended.

5. Pursuant to Local Rule 2.10. Defendants are hereby admonished to refrain from writing letters to this Court or otherwise communicating with this Court unless opposing counsel is present.

IT IS SO ORDERED.

RICHARD A. GADBOIS, JR.

UNITED STATES DISTRICT JUDGE

DATED: December 18, 1991

APPENDIX D

JOHN J. QUINN (STATE BAR NO. 029588)
DAVID S. EISEN (STATE BAR NO. 100263)
D. JAY RITT (STATE BAR NO. 138661)
QUINN, KULLY AND MORROW
A PROFESSIONAL LAW CORPORATION
520 SOUTH GRAND AVENUE
EIGHTH FLOOR
LOS ANGELES, CALIFORNIA 90071
TELEPHONE: (213) 622-0300

ATTORNEYS FOR DEFENDANTS
FULBRIGHT & JAWORSKI, ET AL.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
JANUARY 31, 1992

CHING LUEN ENTERPRISES CO.,
LTD., A TAIWAN, REPUBLIC OF
CHIAN, CORPORATION,

PLAINTIFF,

VS.

PETER H. MASON, ET AL.,

DEFENDANTS.

CASE NO. 91 5962 RG (Ex)

JUDGMENT ON DECISION BY THE COURT

DATE: DECEMBER 16, 1991

TIME: 10:00 AM

DEPT: COURTROOM OF HON. RICHARD GADBOIS

The Motion to Dismiss by defendants Fulbright & Jaworski, et al. (collectively "Fulbright"), came on for hearing on December 16, 1991 before the Honorable Richard A.

Gadbois, Jr. The Motion was converted to a Motion for Summary Judgment by the Court pursuant to Federal Rule of Civil Procedure 12 (b). Jed Silverstrom appeared on behalf of Plaintiff Ching Luen Enterprises Co., Ltd. ("CLE"). John J. Quinn and David S. Eisen of Quinn, Kully & Morrow appeared on behalf of the defendants. Both sides were thereafter given an opportunity by the Court to submit evidence in connection with the Motion for Summary Judgment. The issues having been duly heard and a decision having been duly rendered as to all defendants,

IT IS ORDERED AND ADJUDGED:

That the plaintiff take nothing, and that the action be dismissed on the merits.

date: 1-31-92

RICHARD A. GADBOIS,JR.

FEDERAL DISTRICT JUDGE

Submitted by:

QUINN, KULLY & MORROW

A PROFESSIONAL LAW CORPORATION

JOHN J. QUINN

DAVID S. EISEN

D. JAY RITT

BY (SIGNATURE)

DAVID S. EISEN

DATED: JANUARY 23, 1992

(Served simultaneously on counsel

for plaintiff pursuant to Local Rule 14.5)

APPENDIX E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JANUARY 31, 1992

CHING LUEN ENTERPRISES CO., LTD., A TAIWAN, REPUBLIC OF CHINA, CORPORATION,

PLAINTIFF,

V.

PETER H. MASON, ET AL.,

DEFENDANT.

CASE NO. CV 91-5962

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS FULBRIGHT & JAWORSKI, ET AL.

On December 16, 1991, the Motion to Dismiss by defendants Fulbright & Jaworski and certain of its partners (collectively "Fulbright") came on for hearing before the Honorable Richard A. Gadbois Jr.. Jed Silverstrom appeared on behalf of Plaintiff Ching Luen Enterprises, Ltd. ("CLE"). John J. Quinn and David S. Eisen of Quinn, Kully & Morrow appeared on behalf of Fulbright.

Conversion to Rule 56

Although Fulbright sought dismissal under Federal Rule of Civil Procedure 12 (b) (6) for failure to state a claim, the Court announced its intention at the hearing on the

motion to treat Fulbright's motion as a Motion for Summary Judgment under Federal Rule of Civil Procedure 56. The Court made this conversion because plaintiff had presented matters outside of the pleading by attaching various exhibits to its complaint.[3]

Although the exhibits submitted by plaintiff demonstrate that Fulbright is entitled to judgment as a matter of law, the Court allowed plaintiff five (5) court days to present additional evidence in opposition to the motion. See Order of December 18, 1991. In response to the Court's order, plaintiff filed a supplemental memorandum in opposition to Fulbright's motion "declining the Court's invitation to submit additional

[3] While the Court could have treated the exhibits as a part of the complaint and ruled on Fulbright's motion to dismiss, the Court finds that the better approach is to consider the exhibits as matters outside of the pleading and rule on the motion pursuant to FRCP 56.

evidence and material in opposition to" Fulbright's motion in order to preserve its objections to the conversion of this motion to a Rule 56 determination. See Plaintiff's Supplemental Memorandum of Points and Authorities In Opposition To Defendant Fulbright and Jaworski's Motion To Dismiss Plaintiff's Complaint at 3. Because plaintiff has refused to present any further evidence or to request further time in which to respond to the motion, see FRCP 56 (f), the Court grants Fulbright's Motion For Summary Judgment and determines that the following have been established as findings of fact and conclusions of law:

Findings of Fact

1. The "file transfer letter" purportedly sent by CLE to Fulbright was not addressed to

Fulbright or any of Fulbright's employees or agents. Rather, it was a form letter addressed to Francisca Araiza (who was then acting as counsel to a third party, Liang-Houh Shieh, in litigation against Fulbright) and two other individuals.

2. The letter does not instruct Fulbright to do anything. It purports to give Araiza and the other two addressees the right to take back any remaining money in CLE's trust account and to "take the Files without [Fulbright's] knowledge and/or consent." The letter instructs that "upon receipt [presumably by Fulbright] ... all future communications ... must be directed to Francisca Araiza."

3. After being shown the letter, Fulbright attempted to contact CLE directly,

on May 20, 1991, in order to confirm that CLE in fact wanted its files transferred to Ms. Araiza.

4. When CLE did not respond to that communication, Fulbright sent CLE another letter, dated June 12, 1991, stating that unless CLE objected, Fulbright would send all the files to Ms. Araiza. Again, Fulbright heard nothing from CLE.

5. Fulbright then attempted to transfer the files to Ms. Araiza, but Ms. Araiza refused to take the files.

6. Fulbright wrote CLE on August 20, 1991 and stated that unless it heard otherwise, it would forward CLE's files to Shieh, CLE's current attorney.

7. Soon thereafter, Fulbright returned all the client files to Shieh.

Conclusions of Law

1. The First Claim for Breach of Contract against Fulbright is dismissed with prejudice on the grounds that plaintiff did not produce any evidence to create a genuine dispute that Fulbright breached any duty, contractual or otherwise, to CLE.

2. The Second Claim for Breach of the Covenant of Good Faith against Fulbright is dismissed with prejudice on the grounds that plaintiff did not produce any evidence to create a genuine dispute that Fulbright breached any duty, contractual or otherwise, to CLE.

3. The Third Claim for Breach of Fiduciary Duty against Fulbright is dismissed with prejudice on the grounds that plaintiff did not produce any evidence to create a genuine dispute that Fulbright breached any duty, contractual or otherwise, to CLE.

4. The Fourth Claim for Legal Malpractice against Fulbright is dismissed with prejudice on the grounds that plaintiff did not produce any evidence to create a genuine dispute that Fulbright breached any duty, contractual or otherwise, to CLE, or committed malpractice of any kind.

5. The Fifth Claim for Violation of the Equal Credit Opportunity Act against Fulbright is dismissed with prejudice on the grounds that CLE cannot satisfy any of the major statutory requirements for stating such

a claim in that Fulbright was not a "creditor" and CLE was not an "applicant for credit."

6. The Sixth Claim for Trespass against Fulbright is dismissed with prejudice on the grounds that the pleadings, exhibits and evidence reflect the irrefutable defenses of waiver and estoppel in that CLE by its conduct consented to the retention of the files by Fulbright.

7. The Seventh Claim for Conversion against Fulbright is dismissed with prejudice on the grounds that the pleadings, exhibits and evidence reflect the irrefutable affirmative defenses of waiver and estoppel in that CLE by its conduct consented to the retention of its files by Fulbright.

8. The Eighth Claim for Violation of the Unruh Act against Fulbright is dismissed with prejudice on the grounds that plaintiff has failed to produce any evidence to create a genuine dispute that Fulbright's delay in attempting to return the files was racially based.

9. The Ninth Claim for Negligent Interference with Prospective Economic Advantage against Fulbright is dismissed with prejudice because plaintiff has failed to produce any evidence to create a genuine dispute that Fulbright breached any duty to plaintiff and because plaintiff's allegation of damage is speculative and insufficient to support a claim.

10. The Tenth Claim for Invasion of Privacy against Fulbright is dismissed with

prejudice on the grounds that plaintiff has failed to provide any evidence to create a genuine dispute that Fulbright's conduct was an unreasonable invasion of an arena intended by CLE to remain private.

Defendants Quinn, Kully and Morrow, John J. Quinn and David S. Eisen have already been dismissed from this case on a Motion for Summary Judgment. The Court finds that the converted Motion for Summary Judgment, although filed on behalf of only those Fulbright & Jaworski defendants who had theretofore been served with process, applies equally to all defendants. Therefore, the case shall be dismissed in its entirety and judgment entered on the merits in favor of all defendants

Judgment shall be entered in Fulbright's favor consistent herewith.

signature

RICHARD A . GADBOIS, JR.

UNITED STATES DISTRICT JUDGE

DATED: JANUARY 31, 1992

APPENDIX F

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JANUARY 31, 1992

CHING LUEN ENTERPRISES CO., LTD., A TAIWAN, REPUBLIC OF CHINA, CORPORATION,

PLAINTIFF,

V.

PETER H. MASON, ET AL.,

DEFENDANTS.

CASE NO. CV 91-5962 RG (Ex)

FINDINGS OF FACT AND CONCLUSIONS OF LAW
ON MOTION FOR SUMMARY JUDGMENT OF
DEFENDANTS JOHN J. QUINN, DAVID
S. EISEN, AND QUINN, KULLY AND MORROW
(FED. R. CIV. PROC. 56)

The Motion for Summary Judgment by Defendants John J. Quinn, David S. Eisen and Quinn, Kully and Morrow (collectively "QK&M") came on for hearing on Monday, December 16, 1991 before the Honorable Richard A. Gadbois, Jr.. Hohn Quinn and David Eisen of Quinn, Kully & Morrow appeared on behalf of defendants QK&M. Jed Silverstrom appeared on behalf of plaintiff Ching Luen Enterprises Co., Ltd. ("CLE"). Upon consideration of all pleadings, oral argument, and issues tendered before it, the Court makes the following findings of fact and conclusions of law:

Findings of Fact

1. QK&M was retained by Fulbright and Jaworski ("Fulbright") to represent it in Fulbright's dispute with Liang-Houh Shieh ("Shieh").

2. Prior to the time Shieh sued Fulbright, no one at QK&M had any knowledge of Shieh or any of his "clients", including CLE.

3. The issue of the disposition of Shieh's purported client files, including CLE's file, first arose at the outset of Shieh's lawsuit against Fulbright.

4. QK&M did not at any time have possession of any of CLE's client file prior to their transfer to Shieh.

5. All of the client files which CLE demanded be returned to it were or had been stored at Fulbright and Jaworski's offices at 865 South Figueroa Street, Los Angeles, California.

6. Except for one file which passed through QK&M on its way to Shieh's attorney, no one at QK&M ever saw, or took possession of, any of the client files demanded by Shieh or his agents, prior to the transfer of the files to Shieh.

Conclusions of Law

1. Plaintiff's Sixth Cause of Action against QK&M for Trespass to Personal Property is dismissed with prejudice because no one at QK&M ever had physical possession of CLE's client files.

2. Plaintiff's Seventh Cause of Action against QK&M for conversion is dismissed with prejudice because no one at QK&M ever had physical possession of CLE's client files.

3. Plaintiff's Ninth Cause of Action against QK&M for Negligent Interference with Prospective Business Advantage is dismissed with prejudice because no one at QK&M ever had physical possession of CLE's client files.

Judgment shall be rendered in QK&M's favor consistent herewith, and the Complaint

against QK&M shall be dismissed in its entirety.

signature

RICHARD A. GADBOIS, JR.

UNITED STATES DISTRICT JUDGE

DATED: JANUARY 31, 1992

APPENDIX G

May , 1991

Dear Francisca N. Araiza, Yvonne Luu, Ellen Chiang:

This is to authorize you to take any and all files, material, information and documents (collectively "Files") concerning and/or relating to the following companies, partnerships and/or individuals, and their officers, directors, shareholders, employees, agents and representatives (collectively "Client") from FULBRIGHT & JAWORSKI, and its partners, associates, paralegals, officers, employees, agents and representatives (collectively "Firm"). You are also authorized to take any and all actions and to execute any and all documents as you believe to be necessary on the behalf of Client,

including, but not limited to, taking back all remaining money in the trust account and in other accounts, if any. Any and all actions taken and to be taken, as well as any and all documents executed and to be executed are hereby ratified, confirmed, approved and authorized.

Since the Files belong to Client, you may take the Files without Firm's knowledge and/or consent. The Files are confidential, the Firm is not allowed to keep any copy of Files. Unless otherwise authorized by you in writing, upon receipt of a copy of this letter, Firm is requested to stop all work immediately and to report to you the status of each and every project and case immediately.

Upon receipt of a copy of this letter, all future communications, including but not

limited to billings and monthly pre-lims, from Firm to Client must be directed to:

Francisca N. Araiza, Esq.
30 N. Raymond Avenue, Suite 713
Pasadena, CA 91103
(818) 358-2948

A copy of this letter shall have the same effect as the original. The original shall be kept by you

Very truly yours,

signature
David Chang, individually and in his capacity as an officer of the Ching Luen Enterprise

(efj2)